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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1975

No. 75-575 1

JOSEPH KLEIN and AUDREY MARTIN MACFADDEN,
Petitoners,

vs.

CITY OF MENLO PARK and ELIZABETH K.
JOHNSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement of the case	3
Facts	3
Presentation of federal question in state courts	6
Reason for granting the writ	7
Conclusion	15

TABLE OF AUTHORTIES CITED

Cases

	Pages
Boddie v. Connecticut, 401 U.S. 371 (1971)	10
City of New York v. N.Y., N.H. and H.R. Co., 344 U.S. 293 (1953)	10
Covey v. Town of Somers, 351 U.S. 141 (1955)	10
Grannis v. Ordean, 234 U.S. 385, 394 (1914)	11
Groppi v. Leslie, 404 U.S. 496 at 503 (1971)	10
Hess v. Pawloski, 274 U.S. 352 (1927)	12
Johnson v. Claremont, 40 Cal.2d 826 (1958)	9
Mullane v. Central Hanover Co., 339 U.S. 306 (1950)	10,11
Scott v. City of Indian Wells, 6 Cal.3d 541 (1972)	7
Walker v. Hutchinson City, 352 U.S. 112 (1956)	10
Wuchter v. Pizzutti, 276 U.S. 13 (1926)	12

Codes

California Elections Code:	
Section 4050	9,10
Section 4057	9
California Government Code:	
Section 54773	8
Section 54774	4,5
Section 65854	7,9
Section 68859	3
Menlo Park City Ordinance, Ch. 16.84	5,9

TABLE OF AUTHORITIES CITED
(continued)

Statutes

	Pages
United States Constitution Fourteenth Amendment.....	2
28 U.S.C. §1257(3).....	2

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No.

JOSEPH KLEIN and AUDREY MARTIN MACFADDEN,
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VS.

CITY OF MENLO PARK and ELIZABETH K. JOHNSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California entered in this proceeding on June 5, 1975. (Hearing denied in the California Supreme Court on August 1, 1975.)

OPINIONS BELOW

The original opinion and the opinion on rehearing of the Court of Appeal of the State of California (not reported) appear

in the appendix hereto. The Supreme Court of the State of California denied petitioners a hearing without opinion.

JURISDICTION

The California Court of Appeal's judgment was entered on June 5, 1975. The Court of Appeal denied a timely petition for a second rehearing on June 20, 1975. A timely petition for hearing in the California Supreme Court was denied without opinion on August 1, 1975. This Court's jurisdiction is invoked under 28 United States Code §1257(3).

QUESTION PRESENTED

Whether constructive notice by newspaper publication satisfies due process of law under the 14th Amendment to the United States Constitution where a city government rezones land and the rezoning materially affects the property rights of contiguous and nearby property-owner residents.

STATEMENT OF THE CASE

FACTS

On the application of respondent Johnson, the City of Menlo Park enacted an ordinance changing the zoning of a parcel of real property situated in San Mateo County from single-family residential (10,000 sq. ft. per unit, four units per acre) to a retirement living district (800 sq. ft. per unit, 50 units per acre). (Clerk's Transcript [hereinafter C.T.] p. 31.) The zoning was accomplished pursuant to California's pre-zoning statute which permits a City considering annexing a parcel of County property to "pre-zone" it. California Government Code §68859. Petitioners reside upon and own real property situated within 300 feet of the subject parcel but situated in San Mateo County along the gerrymandered boundary between the City of Menlo Park and the County. (C.T. p. 1-2.) Petitioner MacFadden resides upon and owns property contiguous to the subject parcel. The only notice of the hearings was one published once in a free weekly newspaper circulated within the City of Menlo Park and another adjacent city, Atherton. (C.T. p. 2-3, 126.) Hearings were held before the City Planning Commission (of which

Johnson's architect was an active member) and the City Council. (C.T. p. 2-3.) The ordinance was passed on August 8, 1972. (C.T. p. 3.) Eight months later on March 3, 1973 petitioners gained their first actual knowledge of the proceedings. (C.T. p. 126 and plaintiffs' Exhibit No. 3 in the Trial Court.)

On February 21, 1973 the Local Agency Formation Commission (LAFCO) for San Mateo County approved an application of respondent Johnson for annexation of the subject property to the City of Menlo Park. (C.T. p. 120-121.) At that time the Commission was unaware that the City of Menlo Park had taken advantage of California's prezoning statutes and rezoned the property for a high density retirement center. Nor did the Commission know the Johnson Trust proposed to build a 161-unit retirement center. The Commission thought that the single-family residential zoning was in force and determined that such was consistent with the general plans of San Mateo County and Menlo Park. (C.T. p. 120-121.)

Among the powers and purposes of LAFCO is the discouragement of urban sprawl. California Government Code §54774. LAFCO's approval is required for annexation of

county land to a city. California Government Code §54774.

On March 5, 1973 the Menlo Park Planning Commission held an administrative hearing and granted a use permit to construct 161 retirement units on the four-acre parcel. (C.T. p. 2-3, 126.) Petitioners accidentally learned of this hearing and appeared and argued against the issuance of a use permit. (C.T. p. 18.)

Petitioner Klein timely appealed the granting of the use permit to the Menlo Park City Council. (C.T. p. 41-42.) Notice of the public hearing on Klein's appeal was published and mailed to all owners of property within 300 feet of the subject parcel. (C.T. p. 104-105, 190, plaintiff's Exhibit No. 1 in the Trial Court.) The City Council by vote of three to two denied the appeal. (C.T. p. 189-191.)

Menlo Park City Ordinances Chapter 16.84 require that notice of zoning and use permit hearings be mailed to owners (as their names appear on the County Tax Assessor Records) of property within 300 feet of the subject property. It was stipulated in the trial court that except for Klein's appeal no notice by mail was given to any owners of real property outside the City

of Menlo Park, including petitioners (C.T. p. 126), and that the names and addresses of persons owning land in the County within 300 feet of the subject parcel were at all times readily available to the City of Menlo Park. (C.T. p. 127.)

PRESENTATION OF FEDERAL QUESTION IN STATE COURTS

The question presented was first raised before the Superior Court of the State of California in and for the County of San Mateo by petition for writ of mandamus. Thereafter petitioners raised the question in their timely appeal before the Court of Appeal of the State of California, First Appellate District, Division Four. The Court of Appeal affirmed on the grounds that the record on appeal was inadequate. The Court of Appeal then granted a rehearing and filed a new judgment and opinion holding on the merits that petitioners were not prejudiced by the lack of notice. Petitioners timely sought a second rehearing which was denied without opinion. Petitioners then timely sought a hearing in the Supreme Court of the State of California, which was denied without opinion on August 1, 1975.

REASONS FOR GRANTING THE WRIT

Today the issue presented in this case is of exceptional importance to the public. Every day thousands of municipalities hold so-called "public" hearings and there make rezoning decisions which affect the rights of nearby property owners. Most of these "public" hearings are preceded only by constructive notice by publication. Where notice by mail is given it is often confined (as in this case) to property owners within the city limits so that a nextdoor neighbor who lives across a gerrymandered city-county boundary receives no notice unless he is diligent enough to peruse the inner recesses of all the newspapers circulated within the city. See *SCOTT v. CITY OF INDIAN WELLS*, 6 Cal.3d 541 (1972). Even if a citizen is lucky or astute enough to read such a notice, California law gives him only ten days to prepare and present his objections to a plan which the developer and city planning officials have been preparing for months. California Government Code §65854. In an area such as the San Francisco Bay Area (and probably hundreds of other urban areas) there are dozens of contiguous cities and probably thousands of miles of such artificial,

zig-zagging boundaries. In response to this situation and to discourage urban sprawl, the California Legislature in 1965 enacted §§54773, *et seq.* of the Government Code creating LAFCO. LAFCO must hold public hearings and give notice to affected parties unless it is considering an annexation where all of the owners of the land to be annexed have consented. Rights of adjacent landowners to notice are not recognized.

The collapse of inner cities from the strangulation that accompanies rapid and ill-considered densification of population is spreading to the suburbs. If the democratic process is to work in this legislative area of zoning at local and regional levels, contiguous and nearby residents whose property rights are affected by such decisions must be afforded the opportunity to air their views before legislative action is taken. No body of modern environmental law can be complete without a guarantee of such an opportunity to be heard.

The instant case offers the Court an effective vehicle for dealing with this issue. Here we have a dramatic change from single-family dwellings to a high

density commercial retirement development in a single-family residential neighborhood. Here the developer and City planning officials (one of whom was the developer's architect) met in study sessions months before the zoning application was brought before the City Council. (See Planning Commission Staff Report and Environmental Impact Report contained in defendants' Exhibits B and C in the Trial Court.) Two of the ten-day notices by publication required by the California Government Code §65854 were given late. (C.T. pp. 2 and 3.) The City failed to comply with its own ordinance (Ch. 16.84) requiring notice by mail to owners of property within 300 feet of the development. (C.T. pp. 126-127.) LAFCO approved annexation without any notice to anyone and without knowing that the property's zoning had been changed by pre-zoning. (C.T. pp. 120-121.) In California zoning is a legislative action subject to referendum. California Elections Code §§4050 to 4057; *JOHNSON v. CLAREMONT,* 40 Cal.2d 826 (1958). By the time petitioners learned of the ordinance, eight months after its passage (C.T. p. 126), the referendum period had elapsed.

True, petitioners attended administrative hearings on the use permit eights months after the zoning ordinance was passed. But such administrative proceedings are not subject to referendum. California Elections Code §4050 *et seq.* Even if the City had denied the developer's application for a use permit the zoning ordinance would stand, and later similar applications for use permits could be granted.

Petitioners presented uncontroverted evidence to the trial court that, had they been heard at the zoning stage, the result may well have been different. (C.T. pp. 15, 114, 116, 118, 120.) Certainly petitioners could have sought a referendum to place the matter on a ballot had they known of the zoning ordinance in time.

There are numerous precedents from this Court to guide it in resolving this matter. *MULLANE v CENTRAL HANOVER CO.*, 339 U.S. 306 (1950); *GROPPI v. LESLIE*, 404 U.S. 496 at 503 (1971); *COVEY v. TOWN OF SOMERS*, 351 U.S. 141 (1955); *CITY OF NEW YORK v. N.Y., N.H. and H.R. CO.*, 344 U.S. 293 (1953); *WALKER v. HUTCHINSON CITY*, 352 U.S. 112 (1956); *BODDIE v. CONNECTICUT*, 401 U.S. 371 (1971).

As to the merits of the question whether

constructive notice by publication is sufficient to satisfy due process in this legislative situation, petitioners quote from *MULLANE v. CENTRAL HANOVER CO.*, 339 U.S. 306 (1950):

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.
>
> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *GRANNIS v. ORDEAN*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> "The court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determing when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary to nonresidents. We disturb none of the

established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations] The notice must be of such nature as reasonably to convey the required information, [citation], and it must afford a reasonable time for those interested to make their appearance, [citations]. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possiblity of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' [Citations]

"But when notice is a person's due process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *HESS v. PAWLOSKI*, 274 U.S. 352, with *WUCHTER v. PIZZUTTI*, 276 U.S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible

and customary substitutes.

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." At page 313-315.

"This court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect or even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their righrs. [Citations]

"Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best

notice practicable.

"Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee.... We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the name of due process." At page 317-318.

"As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." At page 318.

"The statutory notice to known beneficiaries is inadequate, not becuase in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund

was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

"In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' [Citation]"

CONCLUSION

Petitioners respectfully submit that the Court should grant a writ of certiorari to the California Court of Appeal.

Dated: October 3, 1975

ROBERTSON & HAND
PAUL K. ROBERTSON, ESQ.
Attorneys for Petitioners.

(Appendices Follow)

APPENDICES

Appendix A

DO NOT PUBLISH

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION FOUR

JOSEPH KLEIN, et al., Plaintiffs-Appellants, vs. CITY COUNCIL OF MENLO PARK, et al., Defendants-Respondents, ELIZABETH K. JOHNSON, Trustee, Real Party in Interest and Respondent.	1 Civil No. 33847 (Sup.Ct.No.174919)

[Filed March 4, 1975]

BY THE COURT:*

Appellants argue that the "sole issue presented in this appeal is whether the City denied appellants due process of law by failing to give appellants notice in a form reasonably calculated under all the circumstances to apprise them of the pendency of the pre-zoning and use permit hearings and afford them the opportunity to appear and present their objections.

* Before Caldecott, P.M., Rattigan, J., and Christian, J.

In pertinent part the trial court found that as a matter of law "the proceedings conducted by the City of Menlo Park in connection with the prezoning of the property were completed without prejudice to any of petitioners herein." The court further found that "the proceedings conducted by the City of Menlo Park in connection with the granting of the use permit were completed without prejudice to any of the petitioners herein as the term prejudice is employed by Section 65801 of the Government Code and Section 1094.5 of the Code of Civil Procedure."

Since this appeal is taken on the Clerk's Transcript alone, it is conclusively presumed that the evidence before the trial court was sufficient to support the findings. (Winkelman v. City of Tiburon (1973) 32 Cal.App.3d 834, 841; Millbrae Assn. for Residential Survival v. City of Millbrae (1968) 262 Cal.App.2d 222,226.) Where an appeal is taken from a Clerk's Transcript alone, the "sufficiency of the evidence to support the findings is not open to review." (Wheelright v. County of Marin (1970) 2 Cal.3d 448, 454.)

Thus, the lower court's finding that the proceedings conducted by the City of Menlo

Park in connection with rezoning the property of real party in interest and granting a use permit, were without prejudice to appellants and not in violation of Government Code section 65801, is not subject to attack in this appeal on the Clerk's Transcript alone.

Furthermore, as respondents point out, the 10-day notice requirement of Government Code section 65801 is not absolute. It is not "constitutionally required to provide for notice of 10 days' duration; section 65801, imposing a test of prejudice as the basis of invalidating a zoning ordinance for 'irregularity' in 'notices,' has in effect substituted the adequacy of notice in fact, as distinguished from its formulary duration, as the test of its adequacy for purposes of due process." (City of Sausalito v. County of Marin (1970) 12 Cal.App.3d 550, 559.)

The trial court thus concluded that "the failure to publish notice ten days prior to the Planning Commission hearing was not prejudicial...." Since appellants "were actually present at the hearing...the actual notice that was imparted...overcomes any inference of prejudice...."(Ibid.)

Finally, appellants' reliance on Scott v.

City of Indian Wells (1972) 6 Cal.3d 541, 546, is misplaced. In Scott the affected landowners had no opportunity to present evidence of their claims as the matter was decided by demurrer. The Supreme Court thus remanded the case for consideration of all the fact. In the present case, the appellants have had opportunity to present their claims before the city council, planning commission and trial court.

Accordingly, since appellants have not been denied due process the decision of the trial court should be affirmed.

The judgment is affirmed.

Appendix B

DO NOT PUBLISH

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION FOUR

JOSEPH KLEIN, et al., Plaintiffs-Appellants, vs. CITY COUNCIL OF MENLO PARK, et al., Defendants-Respondents, ELIZABETH K. JOHNSON, Trustee, Real Party in Interest and Respondent.	1 Civil No. 33847 (Sup.Ct.No.174919)

[Filed June 5, 1975]

BY THE COURT:*

Appellants argue that the "sole issue presented in this appeal is whether the City denied appellants due process of law by failing to give appellants notice in a form reasonably calculated under all the circumstances to apprise them of the pendency of the pre-zoning and use permit hearings and afford them the opportunity to appear and present their objections.

In pertinent part the trial court found

* Before Caldecott, P.J., Rattigan, J., and Christian, J.

that as a matter of law "the proceedings conducted by the City of Menlo Park in connection with the prezoning of the property were completed without prejudice to any of petitioners herein." The court further found that "the proceedings conducted by the City of Menlo Park in connection with the granting of the use permit were completed without prejudice to any of the petitioners herein as the term prejudice is employed by Section 65801 of the Government Code and Section 1094.5 of the Code of Civil Procedure." There is evidence to support these findings in the Staff Report of the Planning Department whose recommendation was adopted by the planning commission.

The 10-day notice requirement of Government Code section 65801 is not absolute. It is not "constitutionally required to provide for notice of 10 days' duration; section 65801, imposing a test of prejudice as the basis of invalidating a zoning ordinance for 'irregularity' in 'notices,' has in effect substituted the adequacy of notice in fact, as distinguished from its formulary duration, as the test of its adequacy for purposes of due process." (City of Sausalito v. County of Marin

(1970) 12 Cal.App.3d 550,559.)

The trial court thus concluded that "the failure to publish notice ten days prior to the Planning Commission hearing was not prejudicial. . . ." Since appellants "were actually present at the hearing . . . the actual notice that was imparted . . . overcomes any inference of prejudice. . . ." (Ibid.)

Appellants' reliance on Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 546, is misplaced. In Scott, the affected landowners had not opportunity to present evidence of thier claims as the matter was decided by demurrer. The Supreme Court thus remanded the case for consideration of all the facts. In the present case, the appellants have had opportunity to present their claims before the city council, planing commission and trial court.

Accordingly, since appellants have not been denied due process the decision of the trial court should be affirmed.

The judgment is affirmed.

SUBJECT INDEX

	Page
STATEMENT OF CASE	2
ARGUMENT	10
1. Summary and Introduction	10
2. The Decision Below Is Clearly Correct	12
a. Zoning Proceedings	13
b. Annexation Proceedings	17
c. Use Permit Proceedings	22
3. Petitioner McFadden Failed to Exhaust Her Administrative Remedies	28
4. Petitioner Klein Does Not Have Standing to Sue	30
5. Petitioners' Authorities Are Not Applicable	32
CONCLUSION	39

TABLE OF AUTHORITIES CITED

CASES

Page

United States

Boddie v. State of Connecticut, et al, 401 U.S. 371 (1971) 37

City of New York v. New York, New Haven and Hartford Railroad Company, 344 U.S. 283 (1953) 38

Covey v. Town of Somers, 351 U.S. 141 (1955) 35

Groppi v. Leslie, 404 U.S. 496 (1972) 36

Mullane v. Central Hanover Company, 339 U.S. 306 (1950) 32

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) 29

Walker v. Hutchinson City, 352 U.S. 112 (1956) 34

Federal

Baron v. O'Sullivan, 258 F.2d 336 (3 Cir. 1958) 29

McLarty v. Ramsey, 270 F.2d 232 (3 Cir. 1959) 29

California

Alexander v. State Personnel Board, 22 C.2d 198, 137 P.2d

	Page
433 (1943)	30
City of Sausalito v. County of Marin, 12 C.A.3d 550 (1970)	17,27
Robinson v. City of Los Angeles, 146 C.A.2d 810 (1956)	31
Silva v. City of Cypress, 204 C.A.2d 374 (1962)	31
Stone v. Turton, 220 C.A.2d 417 (1963)	30
United States v. Superior Court, 19 C.2d 189 (1941)	29
Ward v. County of Riverside, 273 C.A.2d 353 (1969)	27

CODES

California Government Code	
Section 35015	21
Section 65801	17,27
Section 65859	17
California Code of Civil Procedure	
Section 1094.5	27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

JOSEPH KLEIN and AUDREY MARTIN McFADDEN, Petitioners,

vs.

CITY OF MENLO PARK and ELIZABETH K. JOHNSON, TRUSTEE, Respondents.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT ELIZABETH K. JOHNSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, ELIZABETH K. JOHNSON, Trustee of the NEVA HULSE JOHNSTON TRUST (referred to as "Johnson Trust" and "Johnston Trust" in Petition herein), submits the following brief in opposition to the Petition for Writ of Certiorari of Petitioners.

STATEMENT OF CASE

This litigation, and the administrative and legislative proceedings involved herein, involves a single four acre parcel of real property situated in a metropolitan area immediately south of San Francisco, owned by the Neva Hulse Johnston Trust. The property was formerly devoted to use as a private school. The site fronts on a multi-lane urban arterial and is adjacent to town houses, apartments, and a convalescent hospital. Across the arterial is a pocket of unincorporated territory with older residences of a modest nature generally lending themselves to a residential community whose life styles are oriented toward the nearby Stanford University.

In 1972 the owners initiated procedures that ultimately resulted in (1) the zoning of the property for retirement living units, (2) annexation of the property to the adjoining City of Menlo Park, and (3) issuance of a use permit for 161 retirement living units in accordance with the applicable zoning regulations. Thereafter, construction permits were subsequently issued by the City of Menlo Park, and construction commenced in 1974.

In early 1972 representatives of the Johnston Trust contacted numerous neighboring property owners and residents (including several of the trial court petitioners) and "advised of the forthcoming proceedings" (CT 176) which is undisputed by Petitioners

herein (CT 106, 144-5). Zoning proceedings were instituted by the Johnston Trust's application of July 10, 1972, resulting in full zoning proceedings being conducted before both the Planning Commission and the City Council, resulting in a zoning ordinance being adopted on August 22, 1972 (not August 8, 1972, as indicated in the Petition), effective 30 days thereafter. The foregoing adoption of zoning ordinance was preceded by publication of notice of the Planning Commission's hearing, actual hearings before the Planning Commission and the City Council, and notice thereof to Petitioners by Robert V. Johnson, husband of Respondent herein and manager of the Trust property (CT 176). The Johnston Trust filed an application for

a use permit, to permit construction of the 161 unit retirement center, on February 16, 1973, and a public hearing was scheduled for March 5, 1973; Petitioners were notified thereof, and they appeared at the March 5 hearing both in person and through their attorney. The Planning Commission approved the use permit, and Petitioner Joseph Klein (one of the two Petitioners herein) appealed the decision to the City Council (Petitioner Audrey McFadden did not appeal or otherwise proceed with any steps to exhaust her administrative remedies), and Klein's appeal was set for public hearing, full and complete notice was given, and after extensive hearing in which Petitioner participated in person and

through counsel, the matter was referred to the Planning Commission, then to the Traffic Commission for three separate hearings at which Petitioner Klein attended and participated, and back to the City Council which again heard the matter and heard from Petitioner Klein, and ultimately granted the use permit whereupon the Johnston Trust initiated construction. There were also proceedings before the Local Agency Formation Commission (LAFCO), a review commission designed to assist in the orderly growth of California communities (and not designed to assert a negative effect as suggested by Petitioners), relating to anticipated annexation of the Johnston Trust property by the City of Menlo Park, but Petitioners have dropped

and/or waived any challenge to the annexation proceedings (CT 146, 154, 156) and the annexation proceedings were not challenged on appeal to the California District Court of Appeal. Lastly, Petitioners below raised several questions about the nature of the proposed development, but this issue is not before the Court presently, and was determined to be moot by the Court below (CT 180).

At the time of the zoning proceedings mentioned above, Petitioner Klein was not a property owner in the area near the Johnston Trust property, since he did not acquire his property until November 30, 1972, and hence, was not listed as an owner on the 1972-73 assessment roll (CT 176).

After completion of the ex-

haustive administrative and legislative proceedings summarized above (zoning, annexation, and use permit proceedings) where the proposed development was examined extensively, this litigation was instituted by several persons (two of whom are Petitioners herein) in the form of a Petition for Writ of Mandamus in the Superior Court of San Mateo County, California. Proceedings were conducted over an extended period of time, with extensive documentary evidence submitted, and further administrative proceedings being conducted by the City of Menlo Park. The trial court entered its decision sustaining the validity of the Menlo Park proceedings, and adopted extensive Findings of Fact and Conclusions of Law (CT 172-184) and a judgment thereon (CT 186-7).

Thereafter, Petitioners appealed therefrom to the California Court of Appeal, which ultimately affirmed the trial court's judgment, commenting, in pertinent part, that (1) "the proceedings conducted by the City of Menlo Park in connection with the pre-zoning of the property...(and)...the granting of the use permit were completed without prejudice to any of the Petitioners herein...," (2) any failure to publish ten days' prior notice was not prejudicial to Petitioners, since they "were actually present at the hearing ...," and (3) "the appellants have had opportunity to present their claims before the city council, planning commission and trial court." The Court of Appeal ultimately concluded that "... since appellants have not been denied

due process, the decision of the trial court should be affirmed." A petition for hearing by the California Supreme Court was denied August 1, 1975.

ARGUMENT

1. Summary and Introduction

The issues in this case are uniquely narrow, and turn upon the particular facts of this case, and no amount of strained argument should or can magnify this case into one warranting review by the United States Supreme Court on certiorari. Petitioners have received full and complete consideration at administrative levels, including the local Planning Commission, City Council, at the trial court level, and on appeal to the California Appellate Courts.

The decision below was mani-

festly correct, in upholding the proceedings relating to zoning, annexation, and the issuance of a use permit. Petitioners were fully notified of the anticipated nature and extent of the retirement center development, and vigorously opposed the annexation and use permit proceedings. However, Petitioner McFadden did not exhaust her administrative remedies. Further, Petitioner Klein did not acquire his nearby real property until several months after the initial zoning application, hearings, and approval.

The cases relied upon by Petitioners are visibly distinguishable from the case at bar, do not involve zoning proceedings, do not relate to property which was not owned by a complaining party, do not involve

situations where the complaining party had actual notice of the proceedings and actually appeared, do not involve administrative proceedings, and, specifically, do not involve administrative proceedings where the complaining party either failed to exhaust available administrative remedies or was determined to have purchased property after the critical date.

This case does not warrant certiorari by this Court.

2. The Decision Below Is Clearly Correct

The administrative proceedings below fall into three basic categories, zoning proceedings, annexation proceedings, and use permit proceedings, each of which were decided in favor of Respondent.

a. Zoning Proceedings. Zoning proceedings were initiated by the Johnston Trust's application of July 10, 1972. Full and complete zoning investigations, hearings and proceedings were conducted before both the Planning Commission and City Council, resulting in a zoning ordinance being adopted on August 22, 1972. There was evidence that Petitioners were given notice of these zoning proceedings by Robert V. Johnson, husband of Respondent and manager of the Trust property, and the trial court so found (CT 176):

> "In addition, several of the Petitioners, and the prior owner of the Klein property, were personally contacted by Mr. Robert V. Johnson and advised of the forthcoming proceedings."

Furthermore, the trial court

made additional express findings as follows:

> "There was no evidence submitted indicating that Petitioners were residents of the real properties in which they claimed ownership and no finding is made in that regard. There was no evidence submitted as to whose name appeared on the assessment roll as the person designated to receive tax billings and no finding is made in that regard either.
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> * * *
>
> "Petitioner Joseph Klein was not an owner of property in the vicinity of the Johnston Trust property until November 30, 1972, and did not appear as an owner on the 1972-73 assessment roll."

In addition to the foregoing findings relating to Petitioner Klein's advance notice of the proceedings, Petitioners admitted in the trial court that "...the owner went around

the neighborhood sometime in 1972 and talked to some of the petitioners about the development..." (CT 106, 144-5). Also, Mr. Johnson explained the anticipated project in great detail to Petitioner McFadden (Rcbert V. Johnson Declaration filed in the trial court April 20, 1973).

Petitioners' complaint is moot, and they were not prejudiced, which was so determined by the trial court, by the zoning proceedings, in that the pre-zoning now being attacked is an optional procedure; the subsequent use permit proceedings were not dependent upon the validity of the prior proceedings. The ordinances of Menlo Park provide for the granting of use permits for newly annexed and unzoned land, hence, if no zoning procedures had been

instituted, it still would have been appropriate for Menlo Park to issue a use permit for the retirement center. The trial court so concluded (CT 182):

> "B. That the proceedings conducted by the City of Menlo Park in connection with the prezoning of the property were completed without prejudice to any of petitioners herein.
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> "That the notice of the Planning Commission hearing did not technically comply with the ten day publication requirement to Government Code Section 65854 but the Commission's action was by way of recommendation only and under Section 65855 and no prejudice within the meaning of Section 65801 arose.
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> "That the proceedings before the City Council were conducted after more than ten days published notice and said second public hearing was curative of any technical defect in the initial hearing.
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> "The Court concludes that the prezoning proceedings

were controlled by the rules of Section 65801 of the Government Code and the case of City of Sausalito v. County of Marin, (1970) 12 Cal. App. 3d 550.

"The Court further concludes that the zoning procedure is legislative in nature and is not subject to attack by way of administrative mandamus after completion of the proceedings and the effective date of the zoning ordinance.

"In any event, the Court concludes that the point is moot in view of the Court's previous conclusion concerning the completion of annexation proceedings and the provisions of Section 16.28 of the Menlo Park Municipal Code permitting the initiation of use permit proceedings for unzoned property. It is the Court's conclusion that prezoning under Section 65859 of the Government Code is an optional proceeding and that the subsequent use permit proceedings were not dependent upon the validity of those proceedings."

b. Annexation Proceedings.

With respect to the proceedings before the Local Agency Formation Commission (LAFCO), Petitioners seemed to argue that annexation might not have been approved if the Commission had known that "...the Johnston Trust proposed to build a 161 unit retirement center." To the contrary, evidence submitted at the trial court proceedings specifically included the petition submitted to LAFCO by the Johnston Trust which stated "(e) it is desired that the proposed annexation provide for...a 161 Unit Retirement Living Project...." Also, the staff report to LAFCO of February 16, 1973, contained a statement that "(T)he proposed use, a retirement center, does not appear to be in conflict with the county and city general plans." (Emphasis added)

Therefore, Petitioners' assertion that LAFCO did not know of the proposed retirement center does not correctly state the facts which were before the trial court.

In addition, any challenge to the annexation proceedings was dropped by Petitioners at the time of trial. The record of the trial court proceedings clearly indicates (CT 146) that Petitioners' attorney advised the trial court that "we are not actually challenging the validity of the annexation" and, further, that (CT 156) "we are not attacking them (the annexation proceedings) directly." Further, and importantly, the annexation proceedings were not challenged on appeal to the California District Court of Appeal, nor were they the subject of a motion for

rehearing in the Court of Appeal, nor were they raised in Petitioners' Petition for Hearing in the California Supreme Court.

The trial court's findings, with respect to the annexation proceedings, summarize and approve them in detail, recite Petitioners' appearances and objections, Petitioners' withdrawal of objections to the annexation proceedings, as follows:

> "14. In January of 1973, the Johnston Trust did petition for the annexation of the Johnston Trust property to the City of Menlo Park. Said petition described the proposed use of the property as being intended as a "161-Unit Retirement Living project in accordance with the prezoning already granted." Said Petition was processed by the San Mateo County Local Agency Formation Commission on said date and on the recommendation of the

various departments involved, including the recommendation of the Planning Department which stated the 'use proposed for the area did not appear to be in conflict with the County and City General Plans.'

"15. Application for annexation to the City of Menlo Park [was] by petition to the City of Menlo Park, dated February 16, 1973.

"A certified copy of Resolution No. 387 of the Local Agency Formation Commission, approving the annexation of the property to the City of Menlo Park, dated February 21, 1973, was filed with the City of Menlo Park.

"16. The City of Menlo Park thereafter conducted annexation proceedings pursuant to the provisions of Section 35015 of the Government Code of the State of California and did introduce its Ordinance No. 533, entitled 'Ordinance Approving the Annexation of the Hereinafter Described Territory Designated as Lands of Neva Hulse Johnston Trust to the City of Menlo Park' on

February 27, 1973.

"Said Ordinance was passed and adopted as an ordinance of the City of Menlo Park at a meeting of the City Council on the 13th day of March, 1973. No referendum proceedings were initiated.

"17. The attorney for the Petitioners herein, Mr. Paul Robertson, appeared at the Council meeting of March 13, 1973. Petitioner Joseph C. Klein addressed a letter of objection dated March 11, 1973.

"18. The court finds that all proceedings taken in connection with the annexation of the Johnston Trust property to the City of Menlo Park were duly and properly conducted and that no irregularity or defect occurred therein.

"The Court further finds that the petitioners withdrew any objection to the annexation proceedings during the proceedings before this Court on April 24, 1973."

c. Use Permit Proceedings. The

Johnston Trust filed an application for use permit, to permit construction of the retirement center on February 16, 1973, and a public hearing was scheduled for March 5, 1973. Some of the petitioners below were aware of the hearing by March 1, 1973 (one actually submitted a declaration to that effect, contrary to Petitioners' claim that notice was not received until March 3). Petitioners herein appeared at the hearing, in person and by their attorney. The Planning Commission approved the use permit, Petitioner Klein appealed, while Petitioner McFadden did not appeal or otherwise take further steps to exhaust her administrative remedies.

The City Council caused the matter to be set for public hearing,

giving full and complete notice thereof. An extensive hearing was conducted by the City Council on May 22, 1973, which was attended by Petitioners in person and by attorney; the City Council then referred the matter back to the Planning Commission, which conducted further proceedings on June 18, 1973, with the appearance of Petitioner Klein. The Planning Commission then referred the matter to the Traffic Commission which considered it at its hearing of June 20, 1973, again with the appearance of Petitioner Klein, and then referred the matter with its recommendations back to the Planning Commission. Further proceedings were conducted before the Planning Commission on July 2, 1973, and Petitioner Klein spoke at length. The

Planning Commission made recommendations and referred the matter to the City Council, which again conducted a hearing on July 10, 1973, and again heard from Petitioner, at the conclusion of which hearing the use permit was granted.

Petitioners were fully and amply notified and heard in connection with these use permit proceedings, and failed to establish any prejudice from these proceedings, as was specifically found by the trial court.

Further, the trial court made extensive findings of fact specifically relating to the use permit proceedings, reciting the dates, nature and extent of applications, staff reports, studies, uses, etc. Specifically, the court found:

"21. * * *

"Further, at the proceedings before this Court on April 24, 1973, the Petitioners asserted that they were not attacking the development on its merits...and the Court accordingly finds that the allegations of the petition concerning the nature of the proposed development are moot. (Emphasis added)

* * *

"28. Petitioners herein failed to produce any evidence of a prejudicial abuse of discretion or of any prejudicial error. Petitioners failed to produce a transcript of the proceedings before the Planning Commission. Further, Petitioners failed to produce any evidence that they were the persons whose names appeared on the current assessment roll as the owners of property within 300 feet of the Johnston Trust property and, in a situation of the Petitioner Joseph C. Klein... the evidence was to the contrary."

Thereafter, the trial court

reached and stated the following conclusions of law:

> "C. That the proceedings conducted by the City of Menlo Park in connection with the granting of the use permit were completed without prejudice to any of the petitioners herein as the term prejudice is employed by Section 65801 of the Government Code and Section 1094.5 of the Code of Civil Procedure.
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> "That the failure to publish notice ten days prior to the Planning Commission hearing was not prejudicial and was governed by the principles of Sausalito v. Marin, supra, and Ward v. County of Riverside (1969), 78 Cal. Rptr. 46; 273 Cal App 2d 353. Petitioners were actually present at the hearing and the actual notice that was imparted to petitioners overcomes any inference of prejudice that could be drawn even in the absence of any evidence of prejudice.
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> "The Court further concludes that the subsequent public

hearing by the City Council is curative of any defect and afforded petitioners full and ample opportunity to be heard.

"The Court further concludes that, in view of petitioners' failure to make any showing that the standards established by Chapter 16.28 of the Municipal Code have not been complied with, the City of Menlo Park would have no alternative but to issue the use permit applied for.

"It is also the conclusion of the Court that any technical defect in the giving of notice was through the innocent error of respondent without any fault whatsoever on the part of the Real Party in Interest and that a balancing of the equities requires a holding for the Real Party in Interest."

3. Petitioner McFadden Failed To Exhaust Her Administrative Remedies

As indicated above, Petitioner McFadden did not appeal (as did Petitioner Klein) from the City

Council's granting of the use permit on March 5, 1973.

It is clearly established that, as a condition precedent to invoking judicial relief, particularly recourse to the Federal Courts and petitioning for certiorari, is exhaustion of available administrative remedies. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67 (1908), Baron v. O'Sullivan, 258 F.2d 336 (3 Cir. 1958), McLarty v. Borough of Ramsey, 270 F.2d 232 (3 Cir. 1959). On the same issue, the California Supreme Court, in United States v. Superior Court, 19 C. 2d 189, 194 (1941), that:

> "It is now firmly established in this state that a litigant must invoke and exhaust an administrative remedy provided by

> statute before he may resort to the courts. Jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure."

The foregoing proposition and quotation was reaffirmed and restated in Stone v. Turton, 220 C.A.2d 417, 421 (1963). Furthermore, in California the doctrine of exhaustion of administrative remedies requires a petitioner to apply for a rehearing with the administrative agency, if rehearing is available. Alexander v. State Personnel Board, 22 C.2d 198, 137 P.2d 433 (1943).

4. Petitioner Klein Does Not Have Standing To Sue

As indicated above, the zoning proceedings in questions in this litigation occurred in July and August of

1972. Petitioner Klein acquired his property, near the Johnston Trust property, on or about November 30, 1972, and, therefore, was not a property owner in the vicinity during the zoning proceedings (CT 176).

Therefore, Respondent respectfully suggests that Petitioner Klein does not have the requisite beneficial interest, and did not have such at the time of the zoning proceedings in question, to attack those proceedings, notwithstanding the fact that he later acquired property and objected to certain annexation and use permit proceedings. Silva v. City of Cypress, 204 C.A.2d 374 (1962); Robinson v. City of Los Angeles, 146 C.A.2d 810 (1956).

5. Petitioners' Authorities Are Not Applicable

Petitioners have cited, and rely on, the cases cited below, which Respondent submits are distinguishable from, and are not applicable or in point with respect to, the case at bar.

Mullane v. Central Hanover Company, 339 U.S. 306 (1950), involved a provision of New York law which provided that the judicial settlement of accounts by the trustee of a common trust fund could be accomplished after publication of notice in a local newspaper which notice set forth "merely the name and address of the trust company, the name and date of establishment of the common trust fund and a list of all participating estates, trusts, or funds." The name of

the beneficiary involved was not published; he was not otherwise notified. Many of the imcome beneficiaries resided outside of the state and the Court held that the trustee had a fiduciary relationship to those income beneficiaries. The Court went on to note that the trustee is placed into an adversary position in the accounting process and when the trustee is released from giving notice of jeopardy no one else does so. The holding is not a surprising holding for a trust situation where the "trustee has on his books the names and addresses of the income beneficiaries" as a part of the regular fiduciary relationship between the trustee and the income beneficiaries. And even Mullane limits itself to the current income

beneficiaries directly involved with a financial interest and specifically holds that notice can be dispensed with as to other parties "whose interest are either conjectural or future." Applying the reasoning of Mullane by analogy to a zoning situation, we would conclude: first, that a change of zoning should require actual notice to the owner of the property being rezoned (but not necessarily to contingent or future interests) and, second, that other persons in the community are not necessarily entitled to receive actual notice.

Walker v. Hutchinson City, 352 U.S. 112 (1956), was a condemnation proceeding where notice of the Kansas proceedings was given to a landowner only by way of published notice in the

newspaper. The owner's name was known. It was held that such newspaper notification was not adequate for a condemnation proceeding. Significantly, the Court made note of exceptions where persons are missing or unknown or their interests are not definable.

Respondent does not see how Walker applies to a non-property owner, in a non-condemnation situation, where actual notice was received and appearances made over a five-month period.

Covey v. Town of Somers, 351 U.S. 141 (1955), involved a foreclosure of real property owned by a mentally incompetent person. Notice was given to that person but the notice was given prior to the appointment of a guardian, with knowledge that the person was actually incompetent.

A specific ownership interest was being taken. The case simply stands for the proposition that giving notice of a foreclosure proceeding to a person known to be incompetent is not adequate service to permit the taking of a parcel of real property.

Groppi v. Leslie, 404 U.S. 496 (1972), involved a habeas corpus proceeding where the petitioner had been subjected to contempt proceedings by the Wisconsin State Assembly. Petitioner was given no notice of the proceedings or any opportunity to respond by way of a defense and was being held in jail. Essentially, the proceedings which directed that the petitioner be confined to jail were of a criminal nature.

Respondent agrees that a person

has a right to be confronted with charges and given an opportunity to defend before being jailed. However, we respectfully submit that the Groppi case is not applicable to the case at bar, involving a zoning proceeding.

Boddie v. State of Connecticut, et al, 401 U.S. 371 (1971), involved an attack on Connecticut divorce statutes requiring payment of court fees. The court held that indigent persons have the right to initiate divorce actions without the payment of court fees when they are unable to pay such fees.

In the case at bar the Petitioner has not been denied access to the courts and has, in fact, had access to the San Mateo County Superior Court, the District Court of Appeal and the

California Supreme Court on this matter as well as access to the City Council and various commissions of the City of Menlo Park. There has been no suggestion that Petitioners are indigent.

City of New York v. New York, New Haven and Hartford Railroad Company, 344 U.S. 283 (1953), involved the failure of the city to receive the statutory notice provided for in the bankruptcy act with respect to real property tax liens held by the city on specific parcels of land. As in the Walker, Covey and Mullane cases, the court was presented with a specific property right, having a specific dollar value, owned by the petitioner in a specific parcel of land.

As earlier noted, none of

Petitioners' cases involve zoning, property not owned by the complaining party, a situation where the complaining party had actual notice and appeared in the proceedings; similarly, Petitioners' cases do not involve administrative proceedings, or specifically administrative proceedings where the complaining parties either failed to exhaust administrative remedies or did not have the requisite standing to sue by reason of the date of their property acquisition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) SS.
COUNTY OF SAN FRANCISCO)

I, LINDA K. KURLAND, a stenographer in the office of DINKELSPIEL & DINKELSPIEL, attorneys of record for ELIZABETH K. JOHNSON, TRUSTEE, Respondent herein, depose and say that on the 3rd day of December, 1975, I served a copy of the foregoing Brief of Respondent Elizabeth K. Johnson In Opposition to Petition for Writ of Certiorari on JOSEPH KLEIN and AUDREY MARTIN McFADDEN, Petitioners herein, by mailing a copy thereof in a duly addressed envelope, with first class postage prepaid, to their attorney of record, as follows:

PAUL K. ROBERTSON
ROBERTSON & HAND
459 Hamilton Avenue

Palo Alto, California 94301

Linda K. Kurland

Linda K. Kurland

SUBSCRIBED AND SWORN to before me this 3rd day of December, 1975.

Notary Public

